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No. 88-1336

In the

Supreme Court of the United States

October Term, 1988

FRANCISCO S. JIMINEZ, et al.,

Petitioners,

v.

BP OIL, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

ARTHUR W. MACHEN, JR.
JOHN HENRY LEWIN, JR.*
VENABLE, BAETJER AND HOWARD
1800 Two Hopkins Plaza
Baltimore, MD 21201
(301) 244-7400
Counsel for Respondent

March 7, 1989

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

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QUESTIONS PRESENTED

The threshold Question Presented is whether there is, in fact, a conflict between the decision of the Fourth Circuit in the case at bar and the two decisions cited by Petitioners from the First and Second Circuits.

The underlying substantive question, which will only be reached if this Court grants *certiorari,* is as follows:

> Whether the Petroleum Marketing Practices Act ("PMPA"), which permits a petroleum distributor to withdraw from the marketing of gasoline in a relevant geographical area, thereby terminating the franchises with its dealers—provided
>
> > (1) it first offers to sell to its franchisees or grants to them a right of first refusal to buy its leased retail outlets, or
> >
> > (2) in the case of a sale of the leased premises to another distributor, the latter grants non-discriminatory franchises to those dealers—
>
> and which prohibits any state or local subdivision from enforcing any provision of local law regulating such termination, including any remedy or penalty applicable thereto, preempts a Maryland statute purporting to grant to any such terminated dealer a right to recover, from the withdrawing distributor, compensation for loss of goodwill.

LIST OF PARTIES
OPINIONS BELOW
JURISDICTION
STATUTORY PROVISIONS INVOLVED
STATEMENT OF THE CASE

Respondent adopts Petitioners' List of Parties, Opinions Below, Jurisdiction, Statutory Provisions Involved, and Statement of the Case as set forth in the Petition except that:

(1) We take issue with the characterization in Footnote 2 on Page 3 of the Petition that there were any "radical" differences between the contracts offered by Crown and the pre-existing ones in effect with the Respondent. This adjective was not used by the District Court.

(2) We also take issue with the rhetoric in the concluding paragraph of the Statement of The Case that there is any conflict between the decision in the case at bar and decisions of the First and Second Circuits. As demonstrated below, there is no such conflict.

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BRIEF FOR RESPONDENT IN OPPOSITION

The Respondent, BP Oil, Inc., respectfully prays that the Court deny the Petition for Writ of Certiorari sought by the Petitioners, Francisco S. Jiminez, et al., to review the opinion of the United States Court of Appeals for the Fourth Circuit entered on August 8, 1988 and the denial of the petition for rehearing entered on November 16, 1988.

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT IN THE CIRCUITS

The Petitioners would have this Court believe that the decision in the case at bar is in conflict with the decisions of the First Circuit in *Esso Std. Oil Co. v. Dep't of Consumer Affairs,* 793 F.2d 431 (1st Cir. 1986) and the Second Circuit in *Bellmore v. Mobil Oil Corporation,* 783 F.2d 300 (2d Cir. 1986). As to *Consumer Affairs* the contention is frivolous and as to *Bellmore* it is fallacious.

The *Consumer Affairs* case dealt with a local *rent control law* and had nothing to do with a state requirement for the payment for goodwill on termination of a gasoline distributorship. Of course, state laws regulating the industry which do not affect terminations, cancellations or refusals to renew, except incidentally, are not preempted by PMPA. Several cases to this effect are collected in the footnote.[1] In *Consumer Affairs* the First Circuit went out of its way to draw the distinction as follows:

> "The preemption provision of the PMPA would clearly invalidate any DOCA regulation that set rental rates for a franchise *and then* did not allow a franchisor to terminate or not renew a franchise if it did not wish to accept that established rate. That is, any law that gave a franchisee a cause of action to contest a termination of a franchise, when that termina-

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1. In addition to *Consumer Affairs,* cited in the text and involving rent control, see: *Exxon Corp. v. Georgia Ass'n of Petroleum Dealers,* 484 F. Supp. 1008, 1018 (D. Ga. 1979) involving hours of operation; *L. C. Williams Oil Co. v. Exxon Corp.,* 627 F. Supp. 864 (M.D. N.C. 1985) involving unfair competition; *Davis v. Gulf Oil Corp.,* 485 A. 2d 160, 169 (D.C. App. 1984) involving franchise terms; and *Barnes v. Gulf Oil Corporation,* 795 F.2d 358, 360 (4th Cir. 1986) involving a franchisee's assignment rights.

> tion would otherwise be valid under the PMPA, would be preempted by the PMPA." (Emphasis in text. 793 F.2d at 434)

Far from being in conflict with the decision in the case at bar, *Consumer Affairs* supports it: if the local regulation does not impact on a termination, it is not preempted. That is, unless it imposes a condition on a termination that is otherwise valid under PMPA or a remedy or penalty upon the exercise of that privilege, the question of preemption does not even arise.[2]

The decision of the Second Circuit in *Bellmore,* by contrast, is a case which does uphold a state statute requiring payments for goodwill by a distributor who terminates a franchise, even if the termination is valid under PMPA. The critical distinction, however, as noted by the Fourth Circuit, is that *Bellmore did not involve a market withdrawal* where the dealer stays on at his old location as the owner or as lessee under the aegis of a new distributor. In such instances any "goodwill" generated by the dealer at that location remains with him. Thus, as noted by the Fourth Circuit, the goodwill payment sought in the instant case "may be more readily characterized as a penalty than could the payments sought in *Bellmore.*" 853 F.2d at 272; P. App. A. at 11a.

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2. The First Circuit has, in fact, been a staunch supporter of preemption in other cases where a distributor has been found in compliance with the PMPA. So, in *Veracka v. Shell Oil Co.,* 655 F.2d 445 (1st Cir. 1981) the court said: "Thus, an event that constitutes good cause under federal law must also constitute good cause under the similar state statute [citations omitted]. And Shell has therefore complied with the Massachusetts Act." (665 F.2d at 450).

The PMPA recognizes the important distinction between (1) an outright termination, cancellation or refusal to renew and (2) a *bona fide* market withdrawal. In the former, after complying with notice requirements and strict grounds for termination, the distributor is free to walk away from the dealer, leaving him high and dry (as in *Bellmore*), whereas in a withdrawal (as in the case at bar) a distributor must either offer to sell the locations to its dealers or arrange for their transfer to another distributor who will maintain those dealers at their old locations under arrangements that are non-discriminatory vis-a-vis the new franchisor's other dealers. PMPA § 2802 (E) (iii).

Although the principal motivation underlying the PMPA may have been to protect the interests of service station franchisees, the pattern of the statute itself as well as the legislative history show that it was intended "to strike a balance between the at times conflicting interests of the parties to the relationship." U.S. Code Cong. & Admin. News 1978 at 874. Nowhere is this balancing act more apparent than in the special provisions governing a market withdrawal from a defined geographical area.

Thus, the PMPA prohibits a distributor from terminating an individual franchise simply because the location is unprofitable, but when it makes a *bona fide* business decision to pull out entirely from a marketing area, thereby terminating its relationship with all dealers in that area, the PMPA permits it to do so. This is an advantage for the distributor but it is counterbalanced by § 2802(E) (iii) which mandates special provisions to preserve any goodwill held by the dealer, *i.e.*, he must either be given

the opportunity to buy his outlet or receive a non-discriminatory lease from the new distributor. Thus, Congress has fashioned, on the one hand, flexibility for the distributor's legitimate business interests and, on the other hand, protection for the dealer's goodwill with his customers that may have been generated at terminated locations.

It would upset the fine balance drawn by Congress if, in the case of a market withdrawal, a jury were allowed to speculate on damages for loss of goodwill where, in fact, no goodwill has been lost. It is for this reason that the Fourth Circuit was correct in saying that the mandate of a goodwill payment, where termination is caused by a market withdrawal, takes on the character of a "penalty."

The opinion of the Fourth Circuit in the case at bar clearly limited its holding to a *bona fide* market withdrawal in compliance with PMPA. The decision has no effect on any future case arising in that circuit which may be on all fours with *Bellmore*. Unless and until the Fourth Circuit takes the next step by declaring the Maryland goodwill statute preempted in the case of *all* terminations, whether or not they involve a market withdrawal, there will remain no conflict between these circuits.

The bulk of Petitioners' arguments on the issue of a conflict in the circuits centers around *Consumer Affairs* from the First and *Bellmore* from the Second Circuit. However, at the bottom of page 4 of the Petition there is thrown in for good measure an alleged conflict with the Sixth Circuit, an apparent reference to *Consumers Petroleum Co. v. Texaco, Inc.*, 804 F.2d 907 (6th Cir. 1986)

which is cited but not discussed on page 11 of the Petition. Consistent with the rationale in *Bellmore,* it invoked preemption to deny state court claims under a Michigan statute dealing with fraud and misrepresentation because it "has the direct effect of imposing a longer notice requirement upon Texaco than that required under the PMPA" (804 F.2d at 915). The decision has, however, absolutely nothing to do with the case at bar, much less present any conflict between the Fourth and Sixth Circuits. Dealing with different facts and different state statutes, the doctrine of preemption was invoked for different reasons both in *Consumers Petroleum* and in the instant case.

The material at the bottom of page 15 of the Petition is misleading. In *Eden v. Texaco Refining and Marketing, Inc.,* 644 F. Supp. 1573 (D. Md. 1986) the District Court for the District of Maryland enforced a Maryland statute requiring franchisor and franchisee to negotiate in good faith the question of hours of operation, the court holding this particular distributor guilty of bad faith in this process. In *Vasco v. Mobil Oil Corporation,* 698 F. Supp. 102 (D. Md. 1988) the same court held the same local statute preempted because the distributor had acted in good faith in adopting a nationwide policy governing hours of operation in accordance with § 2802(b)(3) of PMPA.

Counsel of record for the Petitioners in the case at bar was also counsel for the plaintiffs in *Eden* and *Vasco* and should have been aware of the difference in the two cases. Yet these decisions have been cited in the Petition for the apparent purpose of suggesting to the Court that confusion reigns supreme among the lower federal courts over the preemption issue. That is simply not true. And

even if *Eden* and *Vasco* were in conflict, the problem would not have been caused by the case at bar which had no bearing on either case.

II. THE CASE AT BAR WAS CORRECTLY DECIDED BY THE FOURTH CIRCUIT

Much of the Petition for Writ of *Certiorari* consists of argumentative material assailing the decision of the Fourth Circuit. These contentions would be more appropriate after the Court has granted *certiorari* than before. At this stage the sole question before the Court is whether or not the decision should be reviewed.

It has already been established that there is no conflict in the circuits. There remains only to be resolved, therefore, whether there exists any of the other grounds for granting *certiorari* as provided in Rule 17 of the Supreme Court Rules. Nothing has been advanced by Petitioners to suggest that this is the case.

The decision in the instant case simply holds that where a specific course of conduct (in this case, a market withdrawal by a petroleum distributor) is sanctioned by federal law (in this case the PMPA), the express provisions of that law mandating preemption preclude any entry into that field by a state law which directly impinges on the area of federal regulation. This conclusion is compelled by standard principles of constitutional law governing the Supremacy Clause. *Michigan Canners & Freezers Ass'n. v. Agricultural Mktg. & Bargaining Board*, 467 U.S. 461, 104 S.Ct. 2518, 81 L.Ed. 399 (1984); *Fidelity Fed. Savings & Loan Ass'n. v. De La Cuesta*, 458 U.S. 141, 102 S.Ct. 3014, 73 L.Ed. 664 (1982); *Hines v. Davidowitz*, 312 U.S. 52, 61 S.Ct. 399, 85 L.Ed. 581 (1941).

CONCLUSION

For the reasons above stated, the Respondent respectfully submits that the Writ of Certiorari should be denied.

ARTHUR W. MACHEN, JR.

JOHN HENRY LEWIN, JR.

VENABLE, BAETJER AND HOWARD
1800 Two Hopkins Plaza
Baltimore, MD 21201
(301) 244-7400

Counsel for Respondent
BP Oil, Inc.